81-2387

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IN THE

Supreme Court of the United States

October Term, 1981

RESTAURANT EMPLOYEES, BARTENDERS AND HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST
and
HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 8,
Petitioners

v.

GATEWAY CAFE, INC.,
KYLE CLEVEN, V.S. LARSON,
BYPASS SALES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTION PRESENTED FOR REVIEW

Whether the term "representative" in Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5) 1947) carries the same meaning as "representative" in Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1935) such that contributions to a multi-employer trust fund pursuant to a union contract are unlawful when the union does not represent a majority of the employer's employees.

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RESTAURANT EMPLOYEES, BARTENDERS AND HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is published in 95 Wn.2d 791, 630 P.2d 1348 (1981). The unofficial report does not reflect an order modifying the original opinion. A copy of that order is reprinted in the Appendix. The Court also relied on a previous case between the parties published at 91 Wn.2d 353, 588 P.2d 1334 (1979).

JURISDICTION

The Washington Supreme Court rendered its judgment July 16, 1981. A timely motion to reconsider was filed and denied March 26, 1982 and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 186(c)(5) (1947)

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver any money or other thing of value-
>
> > (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
> >
> > (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
> >
> > (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purposes of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
> >
> > (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> . . . .

(c) The provisions of this section shall not be applicable. . .(5) with respect to money or other thing of value paid to a trust fund established by such representatives, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical and hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits, or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group be appointed by the district court of the United States for the district where the trust fund has its principal office and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

29 U.S.C. § 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 142:

> When used in this chapter-
> (3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter.

29 U.S.C. § 152(4):

> (4) The term "representatives" includes any individual or labor organization.

29 U.S.C. § 1145:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

Petitioners are a multi-employer trust fund Restaurant Employees, Bartenders and Hotel Service Employees Welfare and Pension Trust (Trust Fund) and Hotel, Motel & Restaurant Employees and Bartenders Union Local No. 8 (Union). Respondents are individuals, Kyle Cleven and

and V.S. Larson, their wholly owned corporation, Gateway Cafe, Inc. and its successor, Bypass Sales, Inc., collectively referred to as the Employer. In early 1975 the Trust Fund entered into an agreement with the Employer to settle an action to collect trust fund contributions due under a 1972 collective bargaining agreement. Part of the agreement provided that the Employer irrevocably assign its bargaining rights to the Restaurant Association multi-employer bargaining group for the ensuing negotiations and be bound by the result. The Employer, after making the agreement, withdrew its assignment, transferred its assets and refused to make contributions.

At the time the settlement agreement was executed one of the employer's employees was a union member but the others were not. The record is silent on whether the union *ever* represented a majority of the employer's employees. There was no election nor authorization card check among employees to determine if the union represented a majority. The Employer did not meet the discretionary monetary standards established by the National Labor Relations Board as required to invoke its representational or unfair labor practice jurisdiction.

This action was commenced by the Trust in state court to collect the delinquent contributions due under the settlement agreement. The Union filed a declaratory judgment action to declare the contract valid and enforceable against the Employer. The cases were consolidated for trial. The trial court bifurcated the trial and considering the contract issue first, determined that the agreements were valid and enforceable. The Employer appealed this determination and the Washington Supreme Court affirmed except that it invalidated "only the one clause of the agreement affording recognition of the union as the employees' exclusive bargaining agent and compelling the employees to join that union or be discharged." *Culinary Workers, Local 596 v. Gateway Cafe, Inc.*, 91 Wn.2d 353, 371, 588 P.2d 1334, 1345 (1979) (*Gateway I*).

On remand, the Employer contended that it was relieved of its obligation to pay trust fund contributions because

Section 302, 29 U.S.C. § 186(c)(5) (1947) made such contributions unlawful since the union was not the "representative" of the employees. The trial court rejected the contentions and entered summary judgment in favor of the Trust for $57,211.41. The Employer pressed its contentions on appeal and the Washington Supreme Court reversed, holding, 95 Wn.2d at 796, 630 P.2d at 1351 that

> For contributions to be lawful they must be made pursuant to a collective bargaining agreement with a union which is a representative of the employees. Under the Labor Management Relations Act, "representative" means "Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees* . . ." LMRA, 29 U.S.C. § 159(a).

See Appendix at B-13. The Court therefore set aside the lower court judgment.

REASONS FOR GRANTING WRIT

I. The Decision Below Is In Conflict In Principle With Decision of This Court Concerning the Proper Interpretation of Section 302 Authorizing Joint Labor-Management Employee Benefit Trusts and Presents Critically Important and Far Reaching Issues Regarding Trust Fund Administration.

A. *The Decision Below Is In Conflict In Principle With This Court's Decisions In U.S. v. Ryan, 350 U.S. 299 (1956), and NLRB v. Amax Coal Co., _____ U.S. _____, 69 L. Ed. 2d 672, 101 S. Ct. 2789(1981).*

Section 302, 29 U.S.C. § 186 generally prohibits payments by employers to labor organizations or "representatives" of employees and makes such payment or receipt of such payment a criminal offense. Section 302(c)(5) however exempts from this prohibition payments to "a trust fund established by such representative for the sole and exclusive benefit of . . . employees. . . ." The Court has recognized that:

> the section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private

> benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers."

United Mine Workers Retirement Funds v. Robinson, ___ U.S. ___, 71 L. Ed. 2d 419, 428, 102 S. Ct. 1226, 1232 (1982); *Arroyo v. United States*, 359 U.S. 419, 425-426 (1959). The trust fund exemption has been interpreted to encourage and foster the creation of trust funds providing employee benefits. In *Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960), the Court held that a Section 302 trust is a special third party beneficiary of a collective bargaining contract and in its action to collect contributions under the contract it was not subject to the defense that the union had violated that contract. *See also, Blassie v. Kroger*, 345 F.2d 58 (8th Cir. 1965) holding that Section 302 (c)(5) requirements are satisfied by agreements other than collective bargaining agreements. *Doyle v. Shortman*, 311 F. Supp. 187 (S.D.N.Y. 1970). More recently in Section 306 (a) of the Multiemployer Pension Plan Amendments Act of 1980, Publ. L. No. 96-364, 94 Stat. 1208, Congress enacted legislation expressly conferring a federal right of action to collect 302(c)(5) trust contributions because of concern that such actions were becoming a battleground to litigate labor-management issues unrelated to the trust obligation. 29 U.S.C. § 1145.

The decision below holding that the term "representative" in Section 302(c)(5) incorporates the definition in Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) thus invalidating trust fund contributions where the union did not represent a majority of the employees conflicts with *United States v. Ryan*, 350 U.S. 299 (1956) and other cases of this Court. In *United States v. Ryan*, the Court interpreted the term "representative" in Section 302 and determined that its meaning was not restricted to the exclusive collective bargaining representative. Section 501 of the Labor-Management Relations Act, 29 U.S.C. 142 (1947) incorporates as the definition of representative the same meaning as used in the National Labor Relations Act enacted

in 1935. The Act in turn defined "representative" to include "any individual or labor organization", 29 U.S.C. 152(4). *Ryan* found that the term was used in the NLRA to mean different things in different contexts and was not confined to exclusive collective bargaining representatives. 350 U.S. at 306-307:

> It is insisted that this interpretation clashes with the use of the term "representative" in various sections of the NLRA. In the majority of the examples given, the scope of the term is made clear by other words in the provisions themselves.[7] But further, the provision in the LMRA that 'representative' shall have its NLRA meaning is no more applicable to §302 than to any other section of the LMRA, and in several other sections of that Act, it is patent that 'representative' cannot be construed to include only the exclusive bargaining representative. For example, §204( ) refers to 'employers and employees and their representatives,' and §211(a) refers to 'interested representatives of employers, employees, and the general public.' There are other examples, but these are sufficient. If the severely restricted construction contended for the word 'representative' is inapplicable to one section of the LMRA, there is no compulsion to apply it to any other section.
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> ---
>
> 7. Examples are, §1, 'designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment.' §7, 'to bargain collectively through representatives of their own choosing.' §8(b)(4)(B) and (C), 'a labor organization as the representative of his employees,' §8(b)(4)(D), 'bargaining representative for employees.'

The Court reached the same result in holding that "representative" in Section 301, 29 U.S.C. § 185, authorized an action to enforce a strike settlement agreement by a union which was not the exclusive collective bargaining representative of employees. *Retail Clerks Local Union No. 128 & 633 v. Lion Dry Goods*, 369 U.S. 17 (1962).

More recently, the Court in *NLRB v. Amax Coal Co.*, _____ U.S. _____, 69 L. Ed. 2d 672, 101 S. Ct. 2789 (1981) held that Section 302(c) trustees are not "representatives" of the employer within the meaning of Section 8(b)(1)(B) of

the Act, 29 U.S.C. § 158(b)(1)(B) which prohibits union coercion of an employer in the selection of his representatives. In *Amax*, the Court emphasized the distinction between the fiduciary duties exercised by management "representatives" on a 302 trust and management collective bargaining representatives referenced in Section 8(b)(1)(B). The decision below conflicts with the *Amax* principle that the diverse purposes of the legislation preclude engrafting principles applicable to unfair labor practice law to trust law.

The Court should grant the Writ in this case because this virtually unprecedented decision[1] conflicts in principle with decisions of this Court on the proper interpretations of Section 302 and creates havoc in the administration of 302 multi-employer trust funds nation-wide.

B. *The Decision Below Creates Significant Problems For The Administration Of Employee Benefit Trust Funds Which Conflict With The Congressional Policy Expressed In The Multi-Employer Pension Plan Amendments Act Of 1980, 29 U.S.C. § 1145.*

The decision below presents significant problems to the administration of trust funds in two critical areas. First, it creates a heretofore non-existent complex and costly defense to trust fund collection efforts. The legislative history of the Multi-employer Pension Plan Amendments Act of 1980 is replete with Congressional concern over the economic health of employee benefit funds and particularly the drain that costly collection efforts place on the benefits available to employees. Senate Committee on Labor and Human Resources, 96th Cong. 2d Sess. quoted in *Kaiser Steel Corp. v. Mullins*, ____ U.S. _____, 70 L. Ed. 2d 833, 850-852, 102 S. Ct. 851, 864-66 (1982) (dissenting opinion). If delinquent employers are able to raise and litigate the question of whether the union has secured and retained the allegiance of a majority of its employees in every collection case the collection effort will become hopelessly mired. This is true

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1. The only case interpreting the precise phrase of Section 302 relied on below is *Bricklayers Local Union No. 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1026 (5th Cir. 1975) which held only that the initial burden of establishing the trust was on the union.

regardless of whether the defense is factually meritorious. The collection cost will soar because of the attorneys' fees, court reporters' fees and other legal costs to dispose of the defense. This result is totally contrary to Congressional intent to protect the financial security of employee benefit trusts by expediting and simplifying the collection effort.

The second critical problem created by the decision below relates to the predicament in which it places benefit plan trustees. Section 302 is a criminal statute and trustees under ERISA are additionally subject to personal financial liability for breach of their fiduciary duty. 29 U.S.C. § 1109 (1974). Prudent trustees in view of the decision below will be placed in the unenviable position of choosing between an expensive monitoring program to ensure that the sponsoring union represents a majority of employees of each contributing employer to the ultimate detriment of employee benefits or alternatively risking personal civil and criminal liability for violating Section 302 by receiving contributions that are tainted by lack of union majority status. Under such circumstances it would not be unreasonable for trustees to insist upon contracts containing union security clauses with stringent current reporting provisions as a condition to trust fund participation. Section 302 was not intended and is ill-designed to serve as a comprehensive labor relations code. The decision below treats it as such contrary to Congressional intent and to the attendant disruption of thousands of joint multi-employer plans and their participants.

Kaiser Steel Corp. v. Mullins, _____ U.S. _____, 70 L. Ed. 2d 833, 102 S. Ct. 851 (1982) does not detract from this conclusion. The question in *Mullins* was whether the employer could interpose an "illegality defense" to the contract clause governing its obligation to make trust contributions. The Court held that, 70 L. Ed. 2d at 845:

> [W]here an §8(e) defense is raised by a party which §8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense.

Here the question is not whether the employer can interject a recognized defense but rather whether lack of majority constitutes a 302 defense in the first place. Thus *Mullins*, relating as it does, to the admissibility and consideration of illegality defenses to the enforcement of the contract clause does not support the decision below which is a substantive interpretation of Section 302.

II. The Federal Question of the Proper Interpretation of Section 302 Was Necessary to the Washington Courts Determination of the Case.

Although the Washington court's conclusion and the bulk of its opinion concern the Section 302 issue the respondent may assert that this Court lacks jurisdiction because there exists an independent and adequate state ground for the decision in the cryptic passage that "It was clearly the intent of the pertinent documents to limit coverage to union employees" 95 Wn.2d at 794, 630 P.2d at 1350. The court's failure to develop this ground and immediate attention to the Section 302 issue strongly suggests that the decision is predicated on the 302 issue, not the language of the pertinent documents. The remainder of the Court's opinion moreover makes it clear that its judgment could not be and was not based on the "pertinent documents". One employee was a union member. Yet the opinion is clear that "no contributions are due." 95 Wn.2d at 798, 630 P.2d at 1352. If the decision were grounded on interpretation of the "pertinent documents" contributions would at least be due for the one employee. The fact that *all* contributions were invalidated shows that the interpretation of Section 302 was critical to the court's decision. Nor can it be said that this omission was oversight. In the petitioner's motion for reconsideration this issue was specifically raised, and the court modified its opinion to state that if the union were the bargaining agent of the employees contributions would be due for both union and non-union employees. The decision is therefore bottomed on federal law and this court has jurisdiction. *United Air Lines v. Mahin*, 410 U.S. 623 (1973); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Delaware v. Prouse*, 440 U.S. 648 (1979).

Even assuming the decision could be grounded on the contract question the Court has jurisdiction because that ground is insufficient and inadequate. The underlying collective bargaining contracts at issue explicitly cover all employees performing bargaining unit work. The language quoted in the opinion comes from the Trust documents, not the collective bargaining contracts and refers to the bargaining unit encompassed by the agreement not employees who are union members. The Court cited no authority for its conclusion and indeed had previously upheld an action by the same Trust to collect contributions against a contention that only union members were to be covered. *Restaurant Employees Welfare Fund v. Rhodes*, 90 Wn.2d 162, 580 P.2d 611 (1978). *See also, Minkoff v. Scranton Frocks, Inc.*, 181 F. Supp. 542 (S.D.N.Y.), *aff'd per curiam*, 297 F.2d 115 (2d Cir. 1960); *Markt v. Ro-Mart, Inc.*, 471 F. Supp. 1292 (Cal. 1979) where contentions that the word "jurisdiction" referenced union membership were rejected. Under these circumstances the state ground is not a sufficient one and therefore this Court has jurisdiction. *Williams v. Kaiser*, 323 U.S. 471, 477-478 (1945); *Ward v. Love County*, 253 U.S. 17 (1920).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

GATEWAY I

[No. 44959. En Banc. January 4 1979.]
CULINARY WORKERS AND BARTENDERS UNION, LOCAL NO. 596, HEALTH AND WELFARE TRUST, Respondent, v. GATEWAY CAFE, INC., ET AL., Appellants, HUBBARD & BURNS, INC., P.S., Respondent.
CULINARY WORKERS AND BARTENDERS UNION, LOCAL NO. 596, Respondent, v. GATEWAY CAFE, INC., ET AL., Appellants.

[1] Labor Relations--Labor Organizations--Labor Management Relations Act -- Purpose. The purpose of the Labor Management Relations Act of 1947 (29 U.S.C. § 141 et seq.) is to prevent the tampering with union officials by illegal payments from employers and the making of illegal payments from union officials to employers.

[2] Labor Relations--Labor Organizations--Trusts--Benefit to Union. The operation of a labor organization trust which results in incidental or collateral benefit to the labor organization without the violation of fiduciary standards by the trustees is not

violative of the Labor Management Relations Act of 1947.

[3] Labor Relations--Labor Organizations--Trusts--Collateral Interests. The requirements of the Labor Management Relations Act of 1947 with respect to labor organization trusts permit a degree of collateral interest on the part of the trustees.

[4] Labor Relations--Labor Organizations--Trusts--Beneficiaries' Interests. The fiduciary requirements of the Labor Management Relations Act of 1947 regarding employer payments to a labor organization trust (29 U.S.C. § 186(c)(5) are not violated by an agreement which results in some incidental or collateral benefit to the labor organization itself so long as no harm to the trust beneficiaries' interests occurs.

[5] Labor Relations--Labor Organizations--Trusts--Employee Retirement Income Security Act--Beneficiaries' Interests. A trustee's collateral interest is not violative of the terms of the Employee Retirement Income Security Act of 1974 unless shown to impair the operation of the labor organization's trust or a beneficiary's interest.

[6] Contracts--Formation--Duress or Business Compulsion--Economic Pressure. A claim of duress or business compulsion in the formation of an agreement requires a showing that a person was deprived of his free will at the time of entering into the agreement. Mere financial pressure which works to bring about the agreement is insufficient for such a claim.

7. Contracts--Formation--Duress or Business Compulsion--Own Proposal. A party who, through counsel, proposes

a business agreement while under financial pressure cannot later claim the agreement to have been entered into under duress or business compulsion.

[8] Appeal and Error--Findings of Fact--Review--In General. Findings of fact which are supported by substantial evidence will be accepted as verities on review.

[9] Corporations--Piercing Corporate Veil--Transferor and Transferee Corporations--Renewal of Obligations. The obligations of a transferor corporation may be renewed as obligations of the transferee corporation when the new organization is a mere continuation or reincarnation of the old one or the transfer is fraudulent.

[10] Corporations--Piercing Corporate Veil--Avoiding Liability--Corporate Officers. Corporate officers, directors, or stockholders may be held liable for corporate obligations when, under the facts and circumstances present, an overt intention to disregard corporate obligations is shown.

[11] Labor Relations--Labor Contracts--Third Party Beneficiaries--Necessity of Agency. An employer-labor organization agreement which is intended to benefit employees as third-party beneficiaries may not be invalidated by the employer's challenge to the organization's status as agents of the employees.

[12] Labor Relations--Labor Organizations--Employer Selection--Effect. An employer's agreement with a labor organization which was not selected or designated by his employees as their

bargaining representative is violative of RCW 49.32.020 which forbids employer interference with the designation of bargaining agents by employees.

[13] Costs--Attorney Fees--In General. The awarding of attorney fees pursuant to an agreement between the parties is a matter addressed to the sound discretion of the trial court.

WRIGHT, C.J., and ROSELLINI, STAFFORD, and DOLLIVER, J.J., concur in the result only.

NATURE OF ACTION: A labor organization trust sought unpaid contributions to the trust from a corporation and individually from its stockholders. The labor organization, in another action consolidated for trial with the first, sought a judgment declaring the validity of an agreement reached with a designee of the corporation and the union.

SUPERIOR COURT: The Superior Court for King County, Nos. 797651, 811716, Janice Niemi, J., on May 31, 1977, entered a judgment that the agreement was enforceable against the corporation and the individual stockholders and ordered a trial on the issue of contributions.

SUPREME COURT: Holding that the actions of the trust representatives did not violate their fiduciary duties under applicable federal acts and finding that the agreement was not made under duress and that it bound the corporation, its stockholders, and successor corporation, the court affirms all parts of the agreement except those severable portions which imposed an employer selected bargaining agent upon the employees which are reversed. The case is remanded for further proceedings.

James R. Dickens (of Karr, Tuttle, Koch, Campbell, Mawer & Morrow, P.S.), for appellants.

Jack R. Burns (of Hubbard & Burns, Inc., P.S.) and Laurence Schwerin (of Hafer, Cassidy & Price), for respondents.

[As amended by order of the Supreme Court January 17, 1979.]

HAMILTON, J.--Restaurant Employees, Bartenders and Hotel Service Employees Welfare and Pension Trust, formerly Culinary Workers and Bartenders Union No. 596 Health and Welfare Trust (respondent), filed suit against Gateway Cafe, Inc., and the Larsons and Clevens (appellants) individually for unpaid contributions to the trust fund. This action was consolidated with a declaratory judgment action filed by the Culinary Workers and Bartenders Union, Local No. 596 (union). The

union sought a determination of the validity of an agreement signed by the Restaurant Association of the State of Washington (association) on behalf of and binding appellants.

The trial court bifurcated the proceeding, hearing first the declaratory aspect of the consolidated actions. After conclusion of this hearing, the trial court declared the agreement binding and enforceable against appellants, awarding attorney fees, and ordered a trial on the issue of the amount due respondent trust fund. The declaration of enforceability constitutes the basis of this appeal, which we agreed to hear.

We reverse the declaratory judgment in part, affirm in part, and remand for further proceedings.

The dispute, engendering a goodly amount of conflicting testimony, centers

around events which, at the outset, require a summarized explanation. Appellants worked for a number of years acquiring and building a business called Gateway Cafe, Inc. (Gateway). On April 25, 1972, they sold their accumulated interests to a person named Munrce pursuant to a stock purchase agreement. At the time of the sale, Gateway was not unionized. On November 21, 1972, Munroe signed, on behalf of Gateway, an agreement which required him to make contributions to an employees' trust fund. Munroe's agreement was to be in effect until 1975.

In January of 1973, the Internal Revenue Service closed Gateway for nonpayment of taxes. Munroe forfeited his interest to appellants. They were then faced with the task of deciding what course of action to follow. After some consideration, they decided to reestablish the

Gateway Corporation, pay back taxes, and operate it under a new name.

Meanwhile, respondent initiated a lawsuit to recover payments due to the trust fund under its agreement with Munroe. It subsequently obtained a default judgment against Gateway for over $6,000. Respondent then took steps to collect the judgment, which in turn led to negotiations with appellants, who were in control of Gateway, regarding satisfaction of the default judgment. By a letter dated December 6, 1974, appellants' attorney communicated a settlement offer to respondent. Under the terms of the proposed settlement, appellants were to sign a detailed agreement providing for substantial employee benefits. In addition, appellants were to direct all employees to join the union; those who failed to join the union were to be discharged. Appellants were to agree to recognize the union

as bargaining agent for all of Gateway's employees, and irrevocably assign their negotiation rights as employers to the association. Finally, the terms of the settlement required appellants to pay $2,000 into the pension trust.

Appellants executed the agreement, assigned their negotiation rights to the association, and paid respondent $2,000. Thereafter, they did not perform as agreed. First, they failed to adhere to their agreement to make contributions into the employee's trust. Then, appellants refused to negotiate with the union and stated they were revoking the assignment of negotiation rights which they had given, irrevocably, to the association. Thus making it clear they did not intend to honor their agreement, appellants retained new counsel who took steps to establish a new corporation called Bypass Sales, Inc. (Bypass).

Gateway's corporate status, which was delinquent as a result of Munroe's forfeiture, was remedied by the filing of an annual report with the Secretary of State. Bypass was then officially formed, and Gateway was dissolved.

Just prior to Gateway's dissolution, respondent filed a new lawsuit against appellants to recover unpaid contributions to the trust. The union then filed the declaratory judgment action seeking determination as to the validity of the agreement under which appellants were to recognize the union and contribute to the trust fund. The two actions were consolidated for trial with the bifurcated result and direct appeal we have already noted.

Appellants raise a number of issues by their appeal. They contend that: (1) the trial court abused its discretion in permitting an amendment of the pleadings;

(2) respondent violated a fiduciary duty owed the trust beneficiaries; (3) the challenged agreement was obtained through duress; (4) the settlement offer was unauthorized; (5) as mere successor employers, they cannot be responsible for Munroe's agreement; (6) they did not bind Gateway; (7) they have no personal liability; (8) Bypass is not liable; (9) they revoked the assignment to the association; (10) the union is not the employees' agent, thus the agreement for the employees' benefit is invalid; (11) public policy warrants setting aside the agreement; (12) the award of attorney fees was an abuse of discretion.

We have considered and will discuss each of these issues in order; however, we find no merit in any of appellants' contentions, except their assertion that a portion of the agreement is violative of public policy.

First, appellants argue they were "potentially" prejudiced by a procedural ruling of the trial court which permitted amendment of respondent's pleadings. The amendment merely reflected a merger of two unions. Court rules, specifically CR 15, permit such amendments. Appellants have not demonstrated they were prejudiced by the amendment. Since they failed to do so, we find no error in the trial court's ruling allowing amendment.

Next, appellants argue respondent violated its fiduciary duty to the trust beneficiaries in negotiating a settlement which collaterally benefitted a labor union. They claim collateral benefits to unions are prohibited under applicable federal law since trustees must act for the sole and exclusive benefit of the trust. Appellants direct our attention to two statutes: the Labor Management Relations

Act of 1947 (LMRA), 29 U.S.C. § 141 et seq. (originally enacted as Act of June 23, 1947, ch. 120, 61 Stat. 136), and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (originally enacted as Act of September 2, 1974, Pub. L. No. 93-406, 88 Stat. 829).

We have assumed, arguendo, that a finding of violation of fiduciary duty would warrant setting aside the agreement.[1] With this assumption in mind, we now examine the above-referenced statutes.

The LMRA makes it unlawful for an employer to make payments to employees or

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1 Both statutes to which appellants have directed our attention provide specific criminal and civil penalties for breaches of trust by fiduciaries. The appellants would urge that an additional penalty--voiding an agreement--is appropriate under these statutes; however, they have not provided us with authority to this effect. We need not address the appropriateness of the remedy they urge since we have found no violation of fiduciary duty.

representatives of employees except as specifically authorized by law. Among the authorized exceptions are payments made:

> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents):

29 U.S.C. § 186(c)(5).

[1-4] We note that the LMRA, of which the above exception is a part, was intended to prohibit employers from tampering with the loyalty of union officials, and to prevent disloyal union officials from giving monetary tribute to employers. Lugo v. Employees Retirement Fund of the Illumination Prods. Indus., 388 F. Supp. 997 (E.D.N.Y. 1975); United States v. Ryan, 225 F.2d 417, 426 (2d Cir. 1955) (L. Hand, C. J., dissenting), rev'd, 350 U.S. 299, 100 L. Ed. 335, 76 S. Ct. 400 (1956).

Section 186(c)(5) is directed against the payment of funds to persons other than trust beneficiaries and against the use of funds supplied by one employer for the benefit of employees of another. Bey v. Muldoon, 223 F. Supp. 489, 495-96 (E.D. Pa. 1963), aff'd per curiam, 354 F.2d 1005 (3d Cir. 1966), cert. denied, 384 U.S. 987, 16 L. Ed. 2d 1004, 86 S. Ct. 1888 (1966). Where the purpose and effects of a transaction are to benefit the union and penalize employees, the transaction is not solely for the employees' benefit, and it is violative of the statutory prohibition. See Insley v. Joyce, 330 F. Supp. 1228, 1234 (N.D. Ill. 1971). Thus, though trustees are held to high standards under the LMRA, in the absence of a substantial showing that trustees have either paid money to employers or have seriously neglected or subverted the interests of

trust beneficiaries, courts should not trivially set aside their actions. Toensing v. Brown, 374 F. Supp. 191, 198 (N.D. Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309, 1311 (9th Cir. 1972).

The settlement agreement in the instant case resolved an existing employer trust fund dispute, avoided possible employer insolvency, and resulted in the continuation of the trust for the employees' benefit. Ultimately, the agreement requiring continued contributions to the trust could conceivably further the actuarial soundness of the trust fund. We do not believe an incidental advantage to the union, assuming such an advantage materializes, would be sufficient to defeat this benefit and make the required substantial showing of trustee misconduct. See Lugo v. Employees Retirement Fund of the Illumination Prods. Indus., supra.

Appellants contend, however, that under Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971), opinion supplemented, 337 F. Supp. 296 (D.D.C. 1972), any incidental or collateral benefit resulting to a union warrants finding violation of fiduciary duty. We disagree. Appellants have taken the holding of Blankenship out of its factual context. In that case, the court did in fact enjoin trustees from operating a fund in a manner designed in whole or part to afford collateral benefits to the union. The injunction, however, was clearly based on specific practices found to be breaches of trust, such as: (1) arrangements between the fund and union that served to the disadvantage of beneficiaries; (2) accumulation of excessive amounts of cash; and (3) recommendations that the fund invest in securities in which the union had an interest. The language in

Blankenship referencing collateral benefits to the union was not intended to be descriptive of the general obligations of trustees under section 186(c)(5). See Blankenship, supra at 1106 and 1113. The trustees were simply held to the usual common-law fiduciary standards. See Blankenship, supra at 1094.

Further, we observe that had Congress wished the total independence of trustees for which appellants contend, it easily could have acted to prohibit a person from serving both as a union representative and as a trustee. But it did not do so. Rather, Congress required both employee and employer representatives to participate in administration of the trust fund. 29 U.S.C. § 186(c)(5)(B). Thus, some degree of collateral interest on the part of the respective trustees was not totally ruled out.

In this case, while respondent, acting on behalf of the trust, had some degree of collateral union interest, the facts do not demonstrate respondent acted impermissibly in administration of the trust. The terms of the agreement and its effects, do not operate in any way to penalize beneficiaries of the trust. Accordingly, we reject appellants' argument that respondent violated the fiduciary duties imposed by section 186(c)(5).

Our examination of ERISA has likewise led us to reject appellants' contention that respondent has violated fiduciary duty standards under that law.

ERISA, like the LMRA, states:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the

interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

29 U.S.C. § 1104(a).

The situations which present a fiduciary with problems of reconciling obligations under ERISA with obligations to an employer, union, and others are numerous. Congress attempted to address the problems

of divided loyalties by prohibiting a fiduciary from acting in any transaction involving a pension plan on behalf of a party whose interests are adverse to the interests of the plan, or participants, or beneficiaries. 29 U.S.C. § 1106(b)(2). Significantly, however, it has also provided that nothing in section 1106 shall be construed to prohibit a fiduciary from serving as such in addition to being an officer, employee, or representative of a party in interest. 29 U.S.C. § 1108(c)(3). Thus, as we noted in discussing the LMRA, under ERISA some degree of collateral interest is permissible.

[5] In light of this, and the specific application of the prudent person rule found in section 1104(a)(1)(B), we do not believe a finding of violation of fiduciary duty is warranted in situations, such as the instant case, where there is no

showing that the fiduciary's collateral interest impaired a trust fund's operation or a beneficiary's interest.

[6] We next consider appellants' contention that the agreement was procured through duress and thus they are not bound by its terms. In order to substantiate a claim of duress, appellants were required to prove that wrongful and oppressive conduct or acts on the part of respondent caused them to execute the challenged agreement. Mere financial pressure which worked to bring about an agreement is insufficient to establish economic duress or business compulsion. Puget Sound Power & Light Co. v. Shulman, 84 Wn.2d 433, 526 P.2d 1210 (1974); W.R. Grimshaw Co. v. Nevil C. Withrow Co., 248 F.2d 896, 904 (8th Cir. 1957). See 13 S. Williston, Contracts § 1606 (3d ed. W. Jaeger 1970). Generally, circumstances must demonstrate a

person was deprived of his free will at the time he entered into the challenged agreement in order to sustain a claim of duress. Whitman Realty & Inv. Co. v. Day, 161 Wash. 72, 77, 296 P. 171 (1931).

[7, 8] In appellants' case the trial court's findings of fact reveal that there was a default judgment against Gateway; appellants sought and obtained legal counsel regarding their liability for this judgment; and, after considering appellants' potential liability, it was appellants' counsel who proposed a compromise settlement of the default judgment. The compromise consisted in part of the challenged agreement. The trial court's findings are supported by substantial evidence, and we accept them as verities. Lassila v. Wenatchee, 89 Wn.2d 804, 576 P.2d 54 (1978); Rutcosky v. Tracy, 89 Wn.2d 606, 574 P.2d 382 (1978); Seattle-First

Nat'l Bank v. Brommers, 89 Wn.2d 190, 570 P.2d 1035 (1977). They establish that appellants had counsel and through counsel proposed the challenged agreement. In light of this, their claim of duress lacks merit.

Similarly, we conclude appellants' claim that their attorney proposed the above settlement without authorization is meritless. The trial court heard both appellants' testimonies and the testimony of their counsel. It weighed these testimonies and found that appellants authorized the settlement. The record contains substantial evidence upon which such a finding could be made, and we will not disturb it on appeal. Brommers, supra at 199.

Appellants next argue that they have no liability, since the initial agreement on which the default judgment was based was

executed by Munroe, a previous employer. They contend they are successor employers and, as such, are not bound by a previous employer's agreements. While the law relative to the obligations of successor employers might be applicable were we addressing appellants' liability directly under the agreement signed by Munroe, we fail to see its applicability under the present facts. Appellants, in compromise of a disputed default judgment, entered and signed a new, separate agreement dated February 13, 1975. By the terms of that agreement, they assumed certain obligations which respondent claims have not been fulfilled. Their liability is not predicated upon successorship to the earlier Munroe agreement, but rather upon an agreement they personally executed in February 1975. Thus, successorship is irrelevant, and that doctrine affords

appellants no relief from the terms of the challenged agreement.

Next, appellants attempt to avoid Gateway's corporate liability by urging that they assumed management of Gateway as mere creditors. They submit they could not, as creditors, effectively execute the challenged agreement in the capacity of corporate officers. Thus, they contend Gateway has no corporate liability.

The evidence does not support this contention. The stock purchase agreement under which Munroe bought Gateway provided appellants the right, in the event of default, to enter and take possession of all corporate property. Notably, the stock purchase agreement did not give appellants a security interest in the property, but rather the right to forfeit Munroe's interest and terminate the purchase.[2]

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[2] 14. If there should be a default by Purchaser in the payment of this Agreement, or should the corporation be in

Under the stock purchase agreement the only capacity appellants could assume upon default was that of corporate owners.

Further, appellants' actions clearly evince their intention to reclaim the business for themselves and not for the benefit of creditors generally. They assumed control of all corporate assets and selectively paid corporate debts as it was

(Footnote 2 continued)

default of any bills, debts or taxes in excess of $1,000.00 in total, and should Purchaser fail to cure any such default within 30 days written notice from Seller, delivered personally to Purchaser or sent by Certified or Registered mail to Purchaser at the Gateway Cafe, 410 Main Street, North Bend, Washington, the seller may elect to declare all of the purchaser's rights hereunder terminated, and upon his doing so, all payments made by purchaser herunder and all improvements placed upon the premises owned by the corporation shall be forfeited to the seller as liquidated damages, and the seller shall have the right to re-enter and take possession of all property owned by the corporation. In the event of any court action by either party, the prevailing party shall be entitled also to recover his costs and a reasonable attorney's fee." (Exhibit 18)

necessary to reestablish business. They also paid business liense fees and taxes, and filed a corporate report with the Secretary of State. In the report they named themselves as Gateway's officers and directors.

We also note that when appellants signed the challenged agreement they executed an addendum thereto "individually, and on behalf of the corporation". (Italics ours.) The record therefore reflects appellants undertook action on behalf of the corporation and represented themselves as its officers and directors. We believe the trial court's findings and conclusions regarding Gateway's corporate liability are amply sustained. Accordingly, we affirm Gateway's liability.

The trial court also found appellants personally liable for performance of the terms of the agreement. Further, upon the

dissolution of Gateway and the incorporation of Bypass, the trial court held that Bypass became liable for Gateway's corporate obligations under the agreement. Appellants contend that responsibility for performance, if any, was solely the corporate responsibility of Gateway. They argue that at the time when it was delinquent or dissolved, the responsibility to perform the terms of the agreement ceased. Thus, they submit they are not personally liable nor can Bypass be liable for performance of the agreement.

As a general rule, a corporate entity and the limitations on liability afforded by corporate structure will be respected by the courts. In certain exceptional cases, however, the device of incorporation may be used to frustrate legitimate obligations. In such cases, courts, in an attempt to bring about justice, have disregarded the

corporate entity, looking through form to the reality of the relations between persons and corporations.

[9] Under some circumstances, a transferee corporation may be liable for the obligations of a transfer or corporation. Thus, where a transfer is fraudulent or the transferee corporation is a mere continuation or reincarnation of an old corporation, courts have held the new corporation liable for the obligations of the old corporation. See, e.g., Kueckelhan v. Federal Old Line Ins. Co., 69 Wn.2d 392, 411, 418 P.2d 443 (1966); Pulis v. United States Elec. Tool Co., 561 P.2d 68 (Okla. 1977); and Economy Refining & Serv. Co. v. Royal Nat'l Bank, 20 Cal. App. 3d 434, 97 Cal. Rptr. 706, 49 A.L.R.3d 872 (1971).

[10] Similarly, the personal liability of corporate officers, directors, or stockholders may result when the facts

illustrate an overt intention to disregard the corporate entity by using it for an improper purpose such as violating or evading a duty owed. See, e.g., Harrison v. Puga, 4 Wn. App. 52, 480 P.2d 247, 46 A.L.R.3d 415 (1971).

It has been concluded that:

> [w]hile the facts of each case, in which the doctrine of disregarding the corporate entity is applied, vary, there is one situation common to all: a right owned and its corresponding duty owed to the person demanding recognition of his right and the performance of its corresponding duty. . . . When the doctrine of disregard is applied, it is applied because of the necessity of enforcing this right-duty.

(Footnotes omitted.) Horowitz, Disregarding the Entity of Private Corporations, 14 Wash. L. Rev. 285, 294 (1939), and Horowitz, Disregarding the Entity of Private Corporations 15 Wash. L. Rev. 1 (1940).

Appellants' case involves a factual situation where it was appropriate to disregard the corporate entity, Gateway, in

order to enforce an obligation. The facts reflect appellants were presented with a default judgment taken against Gateway when it was under Munroe's control. Rather than seeking to have this judgment set aside, they agreed to a compromise settlement. As soon as they agreed to certain obligations as part of the settlement, they began a series of actions which appear to have been designed to avoid their settlement responsibilities. They refused to contribute to the trust fund. They repudiated an expressly irrevocable assignment of bargaining rights. They stated they did not intend to be bound by any future agreements negotiated on their behalf. Finally, they began dissolution of Gateway. The dissolution eventually left Gateway without a single asset. Bypass, a new corporation with substantially identical ownership, operating the identical business

with identical employees in an identical location to Gateway, received all Gateway's assets.

The appellants in good conscience can scarcely complain about the trial court's determination that, in these circumstances, it could not respect Gateway's corporate entity. To do so would in effect place the trial court in the untenable position of assisting in the accomplishment of a breach of duty owed respondent. We find no error in the trial court's conclusions that appellants and Bypass are liable individually and as a corporation for performance of the terms of the challenged agreement.

Next, appellants contend they cannot be liable for the terms of any subsequent agreement negotiated on their behalf by the association. They contend this is so because they have revoked the assignment of

negotiation rights which they gave to the association as part of the settlement.

Appellants cite no authority which supports their contention that they have effectively revoked an expressly irrevocable assignment of negotiation rights. We have accordingly assumed that none exists, and will not consider this rather novel argument. Grant County v. Bohne, 89 Wn.2d 953, 577 P.2d 138 (1978).

Appellants also contend the union representative who was a signatory to the portion of the challenged agreement which bound appellants to contribute to the trust fund was not the employees' agent. They argue that lack of agency renders the agreement invalid.

If we were addressing the employees' obligations under a true "collective bargaining" agreement, that is, an agreement negotiated by a union representative

selected by the employees as their collective bargaining agent, we might find a discussion of agency relevant. Clearly, agents cannot obligate principals without authority.

[11] In the instant case we are not addressing any question regarding the employees' obligations. Rather, in this case we are concerned with whether appellants, as employers, bound themselves to perform certain obligations. We must look to ordinary rules of contract law to answer this question. Barclay v. Spokane, 83 Wn.2d 698, 700, 521 P.2d 937 (1974). Under those rules appellants could intentionally promise, for valid consideration, to perform obligations for the benefit of third parties. See J. Calamari & J. Perillo, The Law of Contracts 379 (1970). Under third-party beneficiary analysis, agency is not determinative, but rather the

important question is whether it was intended that the beneficiaries receive the promised performance. See 4 A. Corbin, Corbin on Contracts § 776 (1951).

In this case the employees were intended beneficiaries. We cannot accept appellants' contention that agency was an additional requisite of validity.

Finally, appellants contend the public policy contained in RCW 49.32.020 prohibits agreements containing a provision such as is involved in this case. They urge us to hold the agreement void in its entirety.

RCW 49.32.020 states, in pertinent part:

> WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to

exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon,

> the jurisdiction and authority of the courts of the state of Washington are hereby enacted.

(Italics ours.)

In Krystad v. Lau, 65 Wn.2d 827, 846, 400 P.2d 72 (1965), we addressed the effect of this policy statement. Faced with a factual setting in which employees were being discharged from employment because of participation in union activities, we held that

> Laws of 1933, Ex. Ses., chapter 7, § 2, p. 10 (RCW 49.32.020), the little Norris-LaGuardia Act, in expressly declaring the public policy of this state, conferred actionable rights on employees, among which rights were that they be free from coercion, interference and restraint from and by their employers in organizing or

> joining a labor union and in designating such union as their agent for collective bargaining.

(Italics ours.)

Then, in Operating Eng'rs Local 286 v. Sand Point Country Club, 83 Wn.2d 498, 519 P.2d 985 (1974) we recognized there were hazards attendant upon unrestrained judicial intervention in the immensely complex area of labor-management relations. We therefore declined to extend Krystad's holding and refused to create an affirmative duty on the part of employers to engage in collective bargaining. Nothing in Sand Point, however, undermines our earlier recognition in Krystad of the basic policy effect of RCW 49.32.020.

Here we are faced with the reverse of Krystad, and we look to Krystad only in that limited light.

In the instant case, it was stipulated at the outset of trial that only one of

appellants' employees was a union member. There had never been an election or procedure whereby the employees could or did express interest in unionizing. Yet appellants, as employers, without employee participation agreed to have a certain union represent all of the then employees. They also agreed to discharge those employees who refused to join this union. The employers' action thus forced all employees to become members of a union which the employers, not the employees, selected. Further, the terms of the agreement forced employees to accept the union as their bargaining representative.

[12] This unilateral employer action, under Krystad, must be viewed in light of RCW 49.32.020, which recognizes the employees' right to be free from the interference of employers in the designation of their bargaining agents. A provision, such as

the one contained in the instant agreement, by which the employer agrees to discharge employees who refuse union membership, is not violative of employees' rights when entered into freely and openly, and when it exerts no compulsion upon the then employees of the contracting employer. Yeager v. Teamsters Local 313, 29 Wn.2d 807, 812, 239 P.2d 318 (1951). But where such a provision is part of an agreement executed unilaterally by an employer in a situation where employees have neither expressed union interest nor had a voice in the selection of a bargaining agent, and thus have not been privy to the agreement, such a provision interferes with their freedom of choice and their right to select their bargaining agent.

In Krystad, we held that conduct which thwarts the intent of RCW 49.32.020 is impliedly prohibited by that statute. In

applying Krystad to the reverse of the coin considered in that case, we do not extend that holding beyond the unique facts of this case.

This conclusion does not, however, necessitate invalidation of the entire settlement agreement. The parties agreed that the clauses of their agreement are severable and, therefore, should any part be declared invalid, the remaining portions of the agreement are not necessarily invalid. Our review of the agreement indicates appellants, in consideration for satisfaction of the default judgment, agreed to perform other obligations for the benefit of the employees. The performance of the other agreed obligations is not against public policy. As a general rule, such obligations are enforceable. J. Calamari & J. Perillo, supra at 573. This case does not present any exception to the

general rule. Accordingly, we reverse the judgment of the trial court by invalidating only the one clause of the agreement affording recognition of the union as the employees' exclusive bargaining agent and compelling the employees to join that union or be discharged.

The terms of the agreement being otherwise enforceable, we affirm the trial court's judgment with regard to the enforceability of the agreement in all other respects.

Appellants have also challenged the award of attorney fees, arguing that until a court determines the amount of the delinquent contributions to the trust, the award is premature. The basis for this contention is a provision in an agreement between the union and the association to whom appellants had assigned their negotiation rights. The provision states:

> In the event . . . the Unions . . . retain legal counsel for the purpose of enforcing the payment of delinquent contributions . . . to the Welfare Fund, the delinquent Employer shall be obligated for all reasonable expenses incurred in connection with the collection effort, including reasonable attorney's fees . . .

[13] The award of attorney fees pursuant to statute or contract is a matter committed to the sound discretion of the trial court. In the absence of a clear showing of abuse of discretion, we will not set aside the trial court's award of attorney fees. Marketing Unlimited v. Jefferson Chem. Co., 90 Wn.2d 410, 583 P.2d 630 (1978).

The contractual language granting attorney fees is broad enough to sustain the exercise of the trial court's discretion in this case. We will not disturb the award.

Respondent trust fund has requested an award of attorney fees on appeal. Since

the matter must be remanded to the trial court for further proceedings, we leave the award and the amount of such fees to the judgment of the trial court, to be exercised at the conclusion of all proceedings in that tribunal.

The cause is remanded for further proceedings in accordance herewith.

UTTER, BRACHTENBACH, HOROWITZ, and HICKS, JJ., concur.

WRIGHT, C.J., and ROSELLINI, STAFFORD, and DOLLIVER, JJ., concur in the result.

Reconsideration denied March 14, 1979.

APPENDIX B

GATEWAY II

[No. 46799-4. En Banc. January 4, 1979.]

CULINARY WORKERS AND BARTENDERS UNION, LOCAL NO. 596, HEALTH AND WELFARE TRUST, ET AL., Respondents, v. GATEWAY CAFE, INC., ET AL., Appellants.

[1] Judgment--Res Judicata--Identity of Subject Matter. The doctrine of res judicata does not bar litigation of a claim which has not been litigated previously.

[2] Labor Relations--Employee Trust Fund--Administration--Applicable Law. The administration of an employee trust fund organized under the Labor Management Relations Act, 29 U.S.C. § 186 (1970) is governed by federal law.

[3] Labor Relations--Employee Trust Fund--Restrictions on Contributions--Construction. The restrictions on employer contributions to employee trust funds established by 29 U.S.C. §

186 are strictly construed to prevent misuse of employee funds.

[4] Labor Relations--Employee Trust Fund--Restrictions on Contributions--Employees' Representative. Under that portion of the Labor Management Relations Act which permits employer contributions to a trust fund established by the employees' representative (29 U.S.C. § 186(c)(5)), an employer may not make contributions to a union trust fund on behalf of employees for whom that union is not their representative for collective bargaining.

NATURE OF ACTION: A labor union trust sought to collect delinquent employer contributions to the trust fund. Although no bargaining representative designation had been made, the union claimed to represent the employees by virtue of its agreement with the employer.

SUPERIOR COURT: The Superior Court for King County, Nos. 797651, 811716, Arthur E. Piehler, J., on January 29, 1980, granted a summary judgment in favor of the trust.

SUPREME COURT: Holding that the claims for contributions were previously settled by the parties, the court reverses the judgment.

James R. Dickens (of Karr, Tuttle, Koch, Campbell, Mawer & Morrow, P.S.), for appellants.

Jack R. Burns (of Hubbard & Burns, Inc., P.S.) and Lawrence Schwerin (of Hafer, Cassidy & Price), for respondents.

[As amended by order of the Supreme Court March 25, 1982.]

Dore, J.--These parties and their dispute were before this court in Culinary Workers, Local 596 v. Gateway Cafe, Inc., 91 Wn.2d 353, 588 P.2d 1334 (1979) (Gateway I). A review of the entire controversy is

necessary to place our current holding in the proper light.

ISSUE

Whether a trust fund can collect contributions on behalf of employees from an employer whose employees are not union members, and which employees had never selected their union representative.

FACTS

Pursuant to a 1972 collective bargaining agreement, Gateway Cafe, Inc. (Gateway) agreed to make contributions to the Restaurant Employees, Bartenders and Hotel Service Employees Welfare and Pension Trust, formerly Culinary Workers and Bartenders Union Local No. 596 Health and Welfare Trust Fund (trust fund). No contributions were made. The trust fund obtained a default judgment against Gateway for approximately $6,000. Settlement negotiations followed efforts to collect on

that judgment. A settlement offer was communicated from Gateway to the trust fund by letter. Its primary terms, relevant here, were that Gateway agreed (1) to sign a detailed interim agreement providing for substantial employee benefits, (2) to pay medical claims incurred by its employees from March 1973, (3) that the existing judgment be satisfied in full by the settlement, and (4) that Gateway pay the trust fund $2,000.

Gateway paid the $2,000 and executed the interim agreement on February 13, 1975 (February agreement). It provided that Gateway recognize the Culinary Workers and Bartenders Union Local No. 596 (union) as the exclusive bargaining agent for all Gateway employees. It further required that all employees of Gateway either join the union or face discharge. By addendum to that agreement, Gateway irrevocably

assigned its negotiation rights as employer to the Restaurant Association of the State of Washington (association). Thereafter Gateway failed to perform, notably by failing to make employer contributions to the trust fund.

It is undisputed that at no time did the Gateway employees ever express a desire to be represented by the union, no election was ever held to determine whether the union would be the representative of the employees, no request to bargain was received, and no authorization cards were signed.

The trust fund filed suit to collect unpaid employer contributions. The union filed a declatory judgment action to determine the validity of the February agreement as well as the validity of a collective bargaining agreement signed August 22, 1975 (August agreement). This

August agreement had been entered into by the union and the association, as negotiator for Gateway. These suits were consolidated for trial.

Gateway I held that the trial court did not err in its determination that the agreements were enforceable against Gateway. However, we did invalidate the sections of the agreements which (1) declared the union as the exclusive bargaining agent of the employees and (2) required that employees join the union. A severability clause protected the remainder of the provisions from invalidity. The cause was remanded for further proceedings and an award of attorney's fees.

On remand the trial court granted the trust fund's motion for summary judgment for contributions due on behalf of all of Gateway's employees for the period May 1974 through May 1978. The court also

awarded liquidated damages (10 percent of the amount of delinquent contributions), attorney's fees and auditing fees. The total judgment was $57,211.41 plus interest.

DECISION

We reverse the trial court and hold that the contributions to the trust fund are not due (1) under the unambiguous language of the agreements themselves and (2) because such contributions would violate federal law. The agreements remain in force in all other respects.

[1] We first dispose of the union's and trust fund's argument that Gateway I's holding of enforceability of the agreements acts as res judicata to bar the instant appeal. The validity of the February agreement was disposed of in Gateway I, and cannot be relitigated here. Res judicata requires an identity of subject matter,

cause of action, persons and parties, and quality of persons for or against whom the claim is made. Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978). Only the declaratory judgment portion of the consolidated trial (i.e., the enforceability of the agreements) was before the Gateway I court. The question of amount of contributions due, if any, had not been litigated. Upon remand, the contributions portion of the case was to be determined. Given our excising of certain portions of the agreements, the question then became whether any contributions were due under the terms of the agreements as they stood after our decision in Gateway I. This issue never having been litigated, there is no res judicata difficulty at this juncture.

It was clearly the intent of the pertinent documents to limit coverage to

union employees. We recognize that at the time of the execution of the documents there was a presupposition that all employees would become union members. Nonetheless, the record discloses the following:

RECITALS:

1. The Working Agreement requires the employers to contribute to a fund to acquire health and welfare benefits for certain individuals who are under the jurisdiction of the unions.

ARTICLE I--DEFINITIONS

5. Employees shall mean all individuals in the industry who are under the jurisdiction of the union.

[2] Even absent the language and intent found in the documents themselves, we hold that no employer contributions are due because such contributions would violate federal law. At the time of the

Gateway I trial in March 1977, it was stipulated that the trust fund was organized under section 302(c) of the 1947 amendments to the National Labor Relations Act (Taft-Hartley Act) (1947), codified in the Labor Management Relations Act (LMRA) 29 U.S.C. § 186 (1970). Consequently, federal law governs administration of this trust fund even though the initial validity of the collective bargaining agreement was determined by state law. Trust Fund Servs. v. Heyman, 88 Wn.2d 698, 565 P.2d 805 (1977).

[3] Section 186 of the LMRA is a criminal statute which restricts payments by an employer to unions, trust funds and other such employee representatives. The statute is strictly construed in order to prevent misuse and abuse of employee funds. Dohrer v. Wakeman, 14 Wn. App. 157, 539

P.2d 91 (1975); Rockey v. Western Conference of Teamsters Pension Trust, 23 Wn. App. 248, 595 P.2d 557 (1979).

Section 186 of the LMRA, however, provides certain limited exceptions to the criminal prohibitions against payments by an employer to an employee representative. The pertinent exception permits money contributions

> paid to a trust fund established by such [employee] representative, for the sole and exclusive benefit of the employees of such employer . . .

(Italics ours.) 29 U.S.C. § 186(c)(5).

[4] Trust fund contributions may not be made under section 186 for employees not represented by the union in the appropriate unit. Rockey v. Western Conference of Teamsters Pension Trust, supra. Such contributions are illegal, and if contributions are made and accepted for persons

not represented by the union, such persons cannot later collect trust benefits. Dohrer v. Wakeman, supra; Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968).

For contributions to be lawful, they must be made pursuant to a collective bargaining agreement with a union which is a "representative" of the employees. Under the Labor Management Relations Act, "representative" means "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . ." LMRA, 29 U.S.C. § 159(a). (Italics ours.) In the present case, as this court confirmed in Gateway I at page 370, the union clearly is not the "representative" of the Gateway employees.

In Shapiro v. Rosenbaum, 171 F. Supp. 875, 885 (S.D.N.Y. 1959):

> In fact, no case construing Section 302 has gone beyond a holding that

"representative of employees" means an individual or labor organization authorized by the employees to act for them in dealings with their employers. (Italics ours.)

These cases uniformly hold that "representative" means the representative designated by the employees.

Without majority employee support, the union is not the representative of the employees regardless of any agreements between the union and the employer. In NLRB v. Canton Sign Co., 457 F.2d 832 (6th Cir. 1972), a collective bargaining agreement similar to the one in the subject case was signed between the employer and the union despite the fact there was no representation election, no card count, nor any other mechanism to determine whether the union was the chosen representative of the employees, wherein the court held:

> The making of such a contract [i.e., the collective bargaining agreement] by a union and an employer without a majority of the involved employees having chosen the union as its bargaining agent would be illegal, and confers no right on the union.
>
> (Italics ours.) NLRB v. Canton Sign Co., supra at 835.

An employer and a union cannot confer "representative" authority upon that union. Such power resides exclusively with the employees. Dickey v. NLRB, 217 F.2d 652 (6th Cir. 1954). Without such representative capacity, the employer cannot make contributions to a trust fund under section 186(c)(5).

In Suro v. Arroyo Lighterage & Shipping Co., 1 N.B.P.C. 832 (D.C.P.R. 1957),[1]

[1] The citation refers to the reporter entitled "Negotiated Employee Benefit Plans Cases". Preliminary facts are also set forth in Copra v. Suro, 236 F.2d 107 (1st Cir. 1956).

an employer association and a labor union entered into a collective bargaining agreement and a trust agreement under which a health and welfare trust fund was established. The agreements provided for the making of contributions to the trust by employers who were not members of the employer association. Thereafter, the union was replaced as the bargaining representative for employees who were employed by members of the employer association, but it continued to represent the employees of independent employers. The court upheld the legality of the trust agreement between the union and the employer, but granted a restraining order prohibiting contributions authorized by such trust agreement because the employees designated a <u>different</u> union to be their representative. In the subject case, even a stronger argument can be made than in

Suro because the Gateway employees have never designated any union to be their representative.

Respondent union cites the recent case of Contractors Health & Welfare Plan v. Associated Wrecking Co., 106 L.R.R.M. 2257 (8th Cir. 1981). This case and others construing section 8(f) of the Labor management Relations Act are not in point. Section 8(f) permits an employer engaged in the building and construction industry to enter into a prehire agreement with a labor organization before the majority status of that organization has been established in accordance with the other provisions of the Act. This special exemption permitting the union to "represent" the employees before an employee election is made was adopted to meet the peculiar needs of the construction industry. NLRB v. Irvin, 475 F.2d 1265 (3d Cir. 1973). Prehire agreements are not permitted in the restaurant industry.

CONCLUSION

1. That where a union is not the representative of the majority of the employees in the appropriate bargaining unit (as determined by union membership, election or otherwise), no contributions are due. However, where a union is the bargaining representative of the majority of the employees, and some employees are nonunion, contributions would be due from employers for both union and nonunion employees.

2. That any claimed employer contributions of Gateway Cafe due for the period between May 1974 and February 13, 1975, shall be precluded, as such claims for contributions were previously settled by the parties.

3. That the contribution provisions in the February and August agreements cannot be enforced. The judgment against

Gateway for employer contributions be set aside.

4. That attorney and auditor fees previously granted in Gateway I at the trial and appellate levels are hereby affirmed in all respects. That the amounts of any unpaid respondent attorney fees for Gateway I shall be set by the trial court.

5. That attorney and auditor fees ordered by the trial court in Gateway II shall be set aside.

BRACHTENBACH, C.J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, HICKS, WILLIAMS, and DIMMICK, JJ., concur.

Reconsideration denied March 26, 1982.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

CULINARY WORKERS AND BARTENDERS UNION, LOCAL NO. 596, HEALTH AND WELFARE TRUST, ET AL,
Respondents,
v.
GATEWAY CAFE, INC., ET AL,
Appellants.

No. 46799-4

ORDER CHANGING OPINION

It is hereby ordered that the opinion in the above cause, as the same appears at 95 Wn.2d 791, be changed as follows:

1. The following sentences beginning in the 10th line from the bottom of page 793 are deleted:

> If any intent was evidenced at all by the employees, it was an election not to unionize. One Gateway employee, however, did become a union member.

2. The section of the opinion labeled "CONCLUSION" beginning in the 10th line from the bottom of page 798 is changed to read as follows:

1. That where a union is not the representative of the majority of the employees in the appropriate bargaining

unit (as determined by union membership, election or otherwise), no contributions are due. However, where a union is the bargaining representative of the majority of the employees, and some employees are nonunion, contributions would be due from employers for both union and nonunion employees.

2. That any claimed employer contributions of Gateway Cafe due for the period between May 1974 and February 13, 1975, shall be precluded, as such claims for contributions were previously settled by the parties.

3. That the contribution provisions in the February and August agreements cannot be enforced. The judgment against Gateway for employer contributions be set aside.

4. That attorney and auditor fees previously granted in Gateway I at the trial and appellate levels are hereby affirmed in all respects. That the amounts of any unpaid respondent attorney fees for Gateway I shall be set by the trial court.

5. That attorney and auditor fees ordered by the trial court in Gateway II shall be set aside.

Dated this 25th day of March, 1982.

/s/_____
Robert F. Brachtenbach
Chief Justice

APPROVED:

/s/_____
Dore, J.

No. 81-2387

Office
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IN THE

Supreme Court of the United States

October Term, 1981

RESTAURANT EMPLOYEES, BARTENDERS AND HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST, et al.,
Petitioners,

v.

GATEWAY CAFE, INC., et al.
Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RESTAURANT EMPLOYEES, BARTENDERS AND HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST, et al.,

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v.

GATEWAY CAFE, INC., et al.,

Respondents

BRIEF FOR RESPONDENTS

STATEMENT

The case background is set forth in Culinary Workers, Local 596 v. Gateway Cafe, Inc., 91 Wn.2d 353, 357-358, 588 P.2d 1334 (1979) (Gateway I) (Pet. App. A-10 to A-13). Briefly, the Culinary Workers and Bartenders Union, Local No. 596 (Union), obtained the signature

of A. D. Munroe, purchaser of the Gateway Cafe, Inc., on a labor agreement in 1972 through top-down organizing. The agreement designated the Union as the bargaining representative for all employees, despite the absence of an election or other expression of employee interest, and required them to join the Union as a condition of employment. The initial validity of this 1972 labor agreement, and the 1975 ones presently at issue, were governed by the uncertainties of Washington state labor law since the Gateway Cafe did not meet the jurisdictional standards set by the National Labor Relations Board. (Gateway I - Pet. App. A-39 to A-45.)

Mr. Munroe defaulted on his purchase and the sellers, Kyle Cleven and V. W. Larson, resumed operation of the cafe unaware of the labor agreement. The Culinary Workers and Bartenders Union

No. 596 Health and Welfare Trust (Trust Fund) took a default judgment in 1974 for unpaid contributions per the 1972 agreement. The default judgment was settled in February 1975 when then Gateway Cafe paid the Trust Fund $2,000.00 for attorneys' fees, signed a five-month interim labor agreement with the Union, and assigned its bargaining rights to an employers' association for the upcoming negotiations. The interim labor agreement, and the subsequent agreement between the Union and the employers' association in August 1975, recognized the Union as the bargaining representative for all employees and required them to join the Union and remain in good standing as a condition of continuing employment. But again there was no election or other procedure whereby the employees ever expressed a desire to have the Union as their bargaining

representative (Gateway I - Pet. App. A-43, and Gateway II - Pet. App. B-6).

Gateway Cafe subsequently recognized its agreement with the Trust Fund to sign such an agreement with the Union violated Washington state public policy, see Bldg. Service Employees Int'l. Union v. Gazzam, 339 U.S. 532 (1950), and it refused to recognize the Union or to pay contributions to the Trust Fund. The Union filed a declaratory judgment action against Cleven and Larson, the Gateway Cafe, Inc., and its successor, Bypass Sales, Inc., respondents herein (collectively referred to hereinafter as Employer), as to the validity of the August 1975 agreement. The Trust brought a separate action against the Employer for unpaid contributions. The Union and Trust Fund actions were consolidated for trial. During the pendency of the consolidated suit the Union and Trust Fund merged into

a new Union and Trust Fund, petitioners herein. Initially only the validity of the August 1975 labor agreement under state law was considered by the trial court. The Employer argued the agreement was invalid in its entirety because key provisions violated state public policy, and the Union contended otherwise. The Washington supreme court agreed with the Employer and invalidated the heart of that agreement, the union recognition and union security clauses, because they violated the state's public policy which recognized the employees' right to choose their own bargaining representative free from interference by their employer (Gateway I - Pet. App. A-39 to A-46).

On remand of Gateway I to the trial court, the parties were faced with the unexpected question of the interpretation of the labor agreement absent the critical union security and recognition

provisions. The Employer contended that no contributions were due the Trust Fund for two separate and independent reasons: (1) analyzing the labor agreement and trust agreement under state contract law, contributions were required only for employees represented by the Union, and there were no such employees; or, alternatively, (2) federal law prohibited contributions to the Trust Fund because the Union was not the representative of the employees. The Washington supreme court agreed with both Employer contentions:

> We reverse the trial court and hold that the contributions to the trust fund are not due (1) under the unambiguous language of the agreements themselves and (2) because such contributions would violate federal law.

Culinary Workers, Local 596 v. Gateway Cafe, 95 Wn.2d 791, 794, 630 P.2d 1348 (1981) (Gateway II - Pet. App. B-8).

ARGUMENT

1. Review should be declined because the state court decision rests on independent and adequate state grounds.

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). Accord, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); City of Mesquite v. Aladdin's Castle, Inc., 102 S.Ct. 1070, 1076 (1982).

The Washington supreme court decided Gateway II initially on the interpretation of the applicable documents under state law (Pet. App. B-8 to B-10). The court concluded "the unambiguous language of the agreements

themselves" precluded the collection of contributions by the Trust Fund (Pet. App. B-8). Only in the alternative ("Even absent the language and intent found in the documents themselves" - Pet. App. B-10) did the court address the federal issue. Therefore it is clear the judgment below rested on an independent and adequate state ground such that the same judgment would be rendered even if the lower court's decision on the federal issue was questioned. Review should be declined.

2. The state court decision was correct and it raises no important question of federal law.

The Gateway II opinion was issued July 16, 1981. The Union and Trust Fund requested reconsideration, raising the same arguments raised herein. The Washington supreme court was advised of this Court's decisions in NLRB V. Amax Coal Co., 101 S.Ct. 2789, reh. denied,

102 S.Ct. 26 (1981), and Kaiser Steel Corp. v. Mullins, 102 S.Ct. 851 (1982), before it denied the motion for reconsideration on March 26, 1982, although it did slightly modify its earlier opinion, without changing the result, to make it clear that trust fund contributions were required for union and non-union members if the union was their bargaining representative (Pet. App. C-1 to C-2).

The Court should fully understand the contentions of the Trust Fund and Union herein. It was their position that although the Trust Fund was established under and governed by federal law, 28 U.S.C. § 186(c)(5), and although the Union was not the representative of the Employer's employees, nevertheless the Trust Fund could collect contributions for all employees. This is contrary to the letter and intent of applicable federal law and acceptance of that

position would set a very undesirable precedent.

The Employer contended, and the Washington supreme court concurred, that "representative" of the employees, as set forth in 28 U.S.C. § 186(c)(5), meant the representative selected by the majority of the employees. See, Shapiro v. Rosenbaum, 171 F.Supp. 875, 885 (S.D.N.Y. 1959). Under federal law, without majority support the union is not the representative of the employees regardless of any side agreements between the union and the employer. NLRB v. Canton Sign Co., 457 F.2d 832 (6th Cir. 1972). This Court too has limited its construction of "representative" of the employees, per 28 U.S.C. § 186(a), to someone authorized by the employees to deal with their employer. United States v. Ryan, 350 U.S. 299, 302 (1956). The Union was never so authorized.

The present case may be one of a kind. It involved Washington state law on the underlying contract validity, and state and federal law on the contribution issue. The Union was a party to the collection effort, an unusual situation itself and due to the necessity to have the lack of Union representative status ruled on by the state court. Accordingly, the holding is unique and limited.

Finally, Gateway II is consistent with the recent decisions of this Court. In Gateway II the state supreme court concluded that there must be a collective bargaining agreement with a union which is the representative of the employees for contributions to be lawful. 95 Wn.2d at 796 (Pet. App. B-13). In NLRB v. Amax Coal, supra, this Court recognized that the trust must have a "detailed written agreement, 29 U.S.C. § 186(c)(5), which

is itself the product of bargaining between the representatives of the employees and those of the employer." 101 S.Ct. at 2798 (emphasis added). Then in Kaiser Steel Corp. v. Julius Mullins, supra, this Court permitted the employer to raise illegality defenses to the underlying collective bargaining agreement with the union in an action for unpaid trust fund contributions. In Gateway II the only place the illegality defense (that the union was not the employees' representative) could be raised was in the Trust Fund contribution suit as there was no NLRB jurisdiction, plus the Union was a party to the Trust Fund collection action which further buttresses the appropriateness of raising the illegality issue then. Therefore, there was nothing contrary to this Court's decisions in that respect either.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: July 1982

Respectfully submitted,

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No. 812387

IN THE

Supreme Court of the United States

October Term, 1981

RESTAURANT EMPLOYEES, BARTENDERS AND HOTEL SERVICE EMPLOYEES WELFARE AND PENSION TRUST
and
HOTEL, MOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 8,
Petitioners

v.

GATEWAY CAFE, INC.,
KYLE CLEVEN, V.S. LARSON,
BYPASS SALES, INC.,
Respondents

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Hotel, Motel, and Restaurant Employees and Bartenders Union Local 8, successor in interest to Culinary Workers and Bartenders Union Local No. 596,

Petitioners

Gateway Cafe, Inc.

Kyle Cleven

V.W. Larson

Bypass Sales, Inc.

Respondents

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IN THE

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Petitioners

v.

GATEWAY CAFE, INC.,
KYLE CLEVEN, V.S. LARSON,
BYPASS SALES, INC.,
Respondents

STATEMENT OF INTEREST OF AMICI CURIAE

The Northwest I.A.M. Benefit Trust, Retail Clerks Trust of Spokane, Employees Dental Trust, Tacoma Marine Machinists Health & Welfare Trust, Tacoma Automotive Machinists Health & Welfare Trust, Lumber & Sawmill Workers Security Fund, Retail Clerks Pension & Welfare Trusts, Washington Office Employees Security Fund, and Allied Metal Crafts Pension Trust, (hereinafter referred to as the Trust Funds), were created pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act 29 U.S.C. §186(c)(5)(B), (hereinafter the "Act"), and are governed by the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq., as amended, (hereinafter "ERISA"). The Trust Funds provide valuable pension and medical benefits to tens of thousands of employees who rely on the promise of those benefits in planning their family retirement and health needs. These Trust Funds are representative of thousands of private pension and health plans nationwide covering millions of employees and involving many billions of dollars.

The publication of the decision in this case has caused a massive disruption in the orderly system for the collection of employee benefit contributions. In essence the case holds that fringe benefit contributions are illegal under Section 302 of the Act unless made pursuant to a collective bargaining agreement with a union which is the exclusive bargaining representative of a participating employer's employees. The ruling will allow employers who have signed labor agreements and obtained the benefits thereof, including labor peace, to ignore the benefit obligations which they have created simply by claiming that a union never achieved majority status among its employees. Thus, even those employers who voluntarily sought a relationship with the union will be able to drop it at any time. This will render these agreements functionally meaningless within the context of protection of employee fringe benefits and the preservation of pension and welfare plan actuarial solvency.

Employee benefit plans cannot operate on hollow and unenforceable promises. Employer contributions are a plan's life blood. A financially sound plan requires a proper actuarial relationship between employer contributions and employee

benefits. Benefits are related to the amount of contributions, which in turn, are directly related to the amount of work performed under the contract. A plan can only safely project a certain benefit if it can reasonably anticipate that contributions will be forthcoming to fund the projected benefit. If there is no assurance that employers will contribute in accordance with their signed agreements, and if in fact employers can ignore their fringe benefit promises at will, the benefit promises of multi-employer plans will have become illusory.

To understand the devastating effect on employees one has to understand the way the Trusts work. They distribute plan booklets to all covered employees describing the relevant benefits to which they may be entitled, be they pension or welfare. The employees then rely on the expectations produced by their employment. Very often delinquencies and other contract breaches are reported to the Trusts by employees, who, having relied on the promise of benefits, have had medical treatment which the Trust has refused to pay after discovering that the employer has failed to pay that employee's contributions. The employee cannot and should not have to monitor the contract to determine that the union has achieved majority status. Yet, *Gateway II* would penalize him for not doing so by denying him the expected benefits.

Numerous employers participating in the Trust Funds have begun to resist their fringe benefit obligations, citing *Gateway II* as authority. By doing so they threaten the financial and actuarial soundness of the plans by invalidating all assumptions as to number of employees reportable and total contributions payable each month. Furthermore, the Trust Funds are now unable to accept employer contributions without fear of violating Section 302. All money collected, totaling millions of dollars each day will have to be held in suspense accounts until the administrator determines that at some point in the past the union attained a majority support.

ARGUMENT

I. Section 302(c)(5)(B) of the Labor-Management Relations Act Does Not Restrict the Payment of Fringe Benefit Contributions to Collective Bargaining Agreements with Exclusive Bargaining Representatives.

Section 302(c)(5)(B) of the Labor-Management Relations Act (hereafter "Act"), 29 U.S.C. 186(c)(5)(B), provides as follows:

> "(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided*, that the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . . ."

The *Gateway II* opinion holds that an employer's payment of fringe benefit contributions is illegal under ths statute unless the union with which it has entered into a contractual relationship is the exclusive bargaining representative of the employees in the unit defined by the agreement. The Court states that:

> "For contributions to be lawful, the must be made pursuant to a *collective bargaining agreement* with a union which is a 'representative' of the employees. Under the Labor Management Relations Act, 'representative' means "*Representatives designated or selected for the purposes of collective bargaining* by the majority of the employees . . ." (at page 6) (Emphasis added.)

A. *The "Collective Bargaining Agreement" Requirement*

It is erroneous to assert that contributions may be legitimately made only pursuant to "collective bargaining agreements". Section 302 provides for the payment of contributions pursuant to "written agreements". Our courts have traditionally recognized that payments into jointly-trusteed funds may be lawful in the absence of a collective bargaining agreement. As stated in *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970):

> "The reference in §302(c)(5)(b) to a 'written agreement with the employer' does not comprehend solely a collective bargaining agreement to the exclusion of any other possible written agreement. A trust fund agreement separ-

ate and apart from the collective bargaining agreement would surely satisfy the statutory prerequisite." (at p. 139)

Upon this basis, the Court sanctioned payments *after* the expiration of the agreement and during the period of negotiations for a new agreement.

In *Doyle v. Shortman*, 311 F.Supp. 197 (S.D.N.Y. 1970), the Court noted that:

> "[A]n extensive search of the legislative history has yielded not a single suggestion that the phrase 'written agreement' as used in Section 302(c)(5)(B) was intended to mean a collective bargaining agreement to the exclusion of all other writings; nor is there any indication that only employers with collective bargaining relations with the union were to be deemed proper parties to Section 302 trust fund."

In conformity with these precepts, trust fund claims for unpaid contributions have been upheld: although the agreement may be invalid, *Lewis v. Seanor Coal Co.*, 259 F.Supp. 256 (W.D.Pa. 1966), *aff'd* 382 F.2d 437 (3rd Cir. 1967), *cert. den.* 390 U.S. 947 (1968); where a prehire agreement has been entered into with a minority union, *Western Washington Cement Masons Trust v. Hillis Homes, Inc.*, 26 Wn.App. 244, *pet. reh. den.* #47200-9 (1980); and where the union did not claim to represent a majority of the employees, *Trust Fund Services v. Heyman*, 15 Wn.App. 452 (1976), *aff'd* 88 Wn.2d 698 (1977), *cert. den.* 434 U.S. 987 (1977). The message of these authorities is that §302 allows for the payment of contributions to jointly-trusteed funds as long as there is a written agreement in effect. Such interpretation furthers the underlying purpose of §302 to protect against misapplication of funds.

There is no supporting authority for the Court's requirement of a collective bargaining agreement as a prerequisite for the lawful payment of contributions. In *Moglia v. Geoghegan*, 267 F.Supp. 641 (S.D.N.Y. 1967), the District Court judge recognized that "the statute does not specify that the written agreement be a collective bargaining agreement." As this principal was affirmed on appeal, *Moglia* does not serve as authority for the Court's decision. *Moglia* merely stands for

the accepted proposition that contribution payments must *at least* be based upon a written agreement binding the party making payment and that the agreement may not be established solely on the basis of estoppel by conduct. *Doyle v. Shortman*, supra.

Neither does the case of *Dohrer v. Wakeman*, 14 Wn.App. 157, 539 P.2d 91 (1975) support the proposition that contribution payments may only be lawfully made under a collective bargaining agreement with an exclusive bargaining representative. The Court's discussion of §302 requirements makes no reference to this issue. *Dohrer* expresses the general rule that owner-operators are not "employees" for purposes of participation in jointly-trusteed funds and that their rights to benefits do not vest solely as a result of the previous self-payment of contributions. *Dohrer* has no relevance to the case at bar.

Neither does the Court find support in *Rockey v. Teamsters Pension Trust*, 23 Wn.App. 248, 595 P.2d 557 (1979). While this case correctly notes that contributions paid without the benefit of a written agreement are unlawful per §302, it does *not* limit the payment of contributions to collective bargaining agreements with "majority" unions. Indeed, *the Court adopted a liberal philosophy regarding the interpretation of rights under* §302 when it stated:

> "[W]e believe the courts must approach the question of employee pension eligibility with the philosophy expressed by Mr. Justice Blackmun, then a judge of the Eighth Circuit, when he said in *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965):
>
> "We would prefer to approach our present task [requested civil relief under Section 302] with a construction policy favoring inclusion and benefits where there is not positive statutory language or inference of exclusion, rather than one favoring exclusion and a denial of benefits where there is no positive language of inclusion."

Reliance on *Suro v. Arroyo Lighterage & Shipping Co.*, 1 NBPX 203 (P.R. 1957) is also misplaced since the district court merely adopted a settlement stipulation of the parties as its findings and conclusions. No independent evaluation of §302 is contained in the opinion, and the facts concern whether there

was equal trustee representation on the fund which is a structural defect not alleged here. *Suro* does not say that §302 requires collective bargaining agreements with majority unions, and it has not been cited for that proposition.

The practical result of the Court's ruling is that union, employers, employees and trust funds may never be certain whether their adherence to the literal provisions of a written agreement will constitute criminal activity under §302. The ruling casts doubt upon the legality and enforceability of thousands of labor agreements in this state and frustrates the expectations of employees in retirement and other benefits. The ruling should be modified to provide for the lawful payment of contributions pursuant to written labor agreements notwithstanding the union majority questions.

B. *The "Representative" Requirement*

The Court's belief that contributions must be supported by a collective bargaining agreement with an exclusive bargaining representative as defined in Section 9 of the Act is also without support. Ths narrow definition of the word "representative" is not supported by previous judicial constructions of the statute. The word "representative" when considered within the context of §302 is read broadly and may include individuals, e.g. labor relations consultants, as well as institutions. This is explicitly recognized in *Shapiro v. Rosenbaum*, 171 F.Supp. 875 (S.D.N.Y. 1959), the sole case cited by the Court on this issue, which states:

> "The Act itself provides, in Section 501(3) (29 U.S.C.A. §142(3), that the term "representative" shall have the 'same meaning as when used in the National Labor Relations Act as amended by this Act.' The pertinent definition is contained in Section 2(4) of the National Labor Relations Act (29 U.S.C.A.§412(4): 'The term 'representatives' includes any individual or labor organization.'
>
> In *United States v. Ryan*, 1956, 305 U.S. 299, 76 S.Ct. 400, 403, 100 L.Ed. 335, the Supreme Court authoritatively held that *the* term "representative" in Section 302 was not limited to the "exclusive bargaining representatives" of employees but was broad enough to include a union

president who was also a member of a wage scale committee which represented the union in bargaining with the employer. The Court specifically stated (350 U.S. at page 302, 76 S.Ct. at page 403),

> "* * * that in using the term 'representative' Congress intended that it include any person authorized by the employees to act for them in dealings with their employers * * * (and) someone in the position of respondent Ryan who represented employees both as a union president and principal negotiator." (Emphasis added)

Since the union represented thousands of employees of association member employers it was a representative within the meaning of the Act. The Court's ruling that the term representative is limited to exclusive bargaining representatives designated or selected for the purposes of collective bargaining by the majority of the employees is simply unsupportable by relevant legal authority. As set forth below, a ruling that requires the trust funds to prove the majority status of the union as part of its prime facie case for recovery is contrary to established cases, statutes and federal policies.

C. *Considerations of Congressional Intent*

The narrow reading of §302 will preclude thousands of employees from obtaining the full benefits of their labor unless the union is shown to be their majority representative. This violates congressional intent. On September 26, 1980, the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311 (1980) was signed into law. This legislation modified the Employee Retirement Income Security Act of 1974, 29 U.S.c. 1001 et seq. (hereinafter referred to as "ERISA"), to provide an express and unambiguous federal cause of action in favor of jointly trusteed funds against employers to recover delinquent fringe benefit contributions. Section 306 of this new legislation provides for a new Section 515 of ERISA which states in pertinent part:

"DELINQUENT CONTRIBUTIONS"

"SEC. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of a collectively bargained agreement shall to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

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"(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce Section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under sub-paragraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For the purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954."

During Senate debate on the legislation, Senator Harrison A. Williams, a sponsor of the bill, explained the legislative purpose of section 306 with particular regard to the problems which "minority" union defenses create for multiemployer funds. In rejecting the defense of lack of union majority in trust claim for delinquent contributions, he stated:

"Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law — other than 29 U.S.C. §186. *Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.*

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The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans. A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. *The* intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.[1] (Emphasis added)

This statement of purpose was repeated in House debates by Congressman Frank Thompson, Jr.[2]

The incongruous result of the ruling of this case is that before a fund may lawfully receive contribution payments from employers signatory to labor agreements they must verify the union's majority status or face the prospect of violation of the criminal proscriptions of §302. Trust Funds are not capable of independently determining whether a union is the representative of a majority of an employer's employees.

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1. 126 Cong. Rec. S.11673 (daily ed., August 26, 1980)
2. 126 Cong. Rec. H. 7899 (daily Ed., August 26, 1980)

As a practical matter, multiemployer plans do not have the resources or the expertise to monitor constantly each employer and make judgements as to whether the union has achieved majority status. To engage in such monitoring would be a wanton waste of plan assets which would otherwise be used for the benefit of plans' participants and their beneficiaries. Yet, if the plan does not engage in such monitoring, it and its trustees will be running the risk of accepting contributions from an employer whose collectively bargained agreement is void and ineffectual for section 302 purposes.

The court's decision traps multiemployer plans and their trustees in a dilemma between the threat of criminal prosecution and expending inordinate amounts of the plan's assets to monitor the day-to-day activities of contributing employers and the unions which represent their employees. For the trustees, who are bound by the strict fiduciary responsibility requirements of the ERISA, 29 U.S.C. §1104-1113, including the requirements to administer the plan in accordance with law, this dilemma involves the additional threat of personal liability for breach of their fiduciary responsibilities. *See* 29 U.S.C. §1109.

This is not an isolated problem. It is an industry-wide problem which the Court's decision has created and it affects literally every multiemployer fund outside the building and construction industry. The defense of lack of majority has been rejected in the building and construction trades context as a result of the *Hillis Homes* decision, supra. If upheld, this decision and the threat of criminal and civil sanctions to which it gives rise, will greatly discourage the continued maintenance of multiemployer plans in the service and industrial trades, a result directly contrary to the policy of the Multiemployer Pension Plan Amendments Act of 1980. The survival of retirement rights should be protected, not threatened by our courts.

ARGUMENT

II. Gateway II Clearly Conflicts with the Leading Case of This Court Holding that Trust Funds are Immune From Defenses Relating to Contract Formation.

A. *Claims For Contributions Based On Work Performed are Insulated From Employer Defenses*

The foundation case concerning defenses to suits by joint labor-managment trustees to recover unpaid contributions, as third-party beneficiaries of collectively bargained agreements is *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 45 LRRM 2719 (1960) which generally involved whether union breaches were defenses to collection suits by trustees and specifically involved whether an employer could offset a judgment he obtained against the union for damages sustained from alleged illegal strikes, against a judgment obtained by the trustees against the employer for unpaid fringe benefit contributions. Before concluding that,

> "[T] parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund meeting the requirement of Section 302(c)(5)..."

the Court observed that,

> "furthermore, Benedict promises in the collective bargaining agreement to pay a specified scale of wages to the employees. It would not be contended that Benedict might recoup its damages by decreasing these wages. This could be rationalized by saying that the covenant to pay wages is included in separate contracts of hire entered into with each employee. The royalty payments are really another form of compensation to the employees, and as such the obligation to pay royalty might be thought to be incorporated into the individual employment contracts. This is not to say that the same treatment should necessarily be accorded to royalty payments, as is accorded to wages, but the similarity militates against the inference that the parties intended that the trustees' claim be subject to offset."

In *Trust Funds Services v. Heyman*, supra., the Court correctly observed that *Benedict Coal* stood for,

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3. 95 LRRM 3040, 3043

"... the principle that such contributions with respect to past labor are in the nature of compensation, the right to which accrues when the work is performed."[3]

Accord: *Lewis v. Seanor Coal*, supra.

The recent case of *NLRB v. Amax Coal Co.* 101 S.Ct. 2789 (1981) supports this principle of guaranteeing payment of benefits for work performed. The Court, citing Congressional history, stated that the sole purpose of §302(c)(5) is to ensure that the employees who are entitled to benefits actually receive them. Nothing in this case suggests that employee benefit obligations may be avoided because the union failed to generate majority support. The implication of the case is that when the employer makes a legitimate promise to pay benefits to a lawfully established trust fund, the employees are entitled to those payments for work performed.

B. *Minority Union Defenses Have Been Rejected*

In *Trust Fund Services v. Heyman*, supra., the contention was that the agreement the trustees were seeking to enforce was illegal because it violated §8(a)(1) and (b)(1)(A) of the Act in that the union did not represent a majority of the employees when the contract was made. In rejecting this defense the Court of Appeals declared,

> "There are three reasons why this contention must be rejected. The first reason is that the determination of an unfair labor practice under the National Labor Relations Act of 1947 - the illegality claimed here - is exclusively a function of the federal system." (Citing *Garmon*, supra.)

and that,

> "(T)he second reason is that Heyman's claim of an unfair labor practice was made too late."

and finally,

> "The third reason is that an unfair labor practice is not

available as a defense to an action by trustees for contributions based upon hours of labor already performed." (citing *Benedict Coal*, supra.)[4]

The Court of Appeals was affirmed 88 Wn.2d 698, 95 LRRM 3040 (Wash.Sup. Ct. 1977), *cert. den.* U.S. 987 (1977). Accord: *Sheriff v. Medel Electric Co.*, supra.; *Audit Services v. Elmo Road Corp.*, supra.; *Pipe Trades v. England*, 69 LRRM 2370 (Cal. Super. Ct. 1968); *Lewis v. Splashdam Do.*, 233 F.Supp. 47, 57 LRRM 2630 (W.D.Va. 1964).

ARGUMENT

III. The Court's Ruling Violates Federal Labor Policy Embodied in the Labor-Management Relations Act and the Employee Retirement Income Security Act

A. *The Court's Ruling Conflicts With National Labor Policy Embodied in The Labor Management Relations Act.*

While placing "collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts"[5] this Court, in *Benedict Coal Co.*, supra., extended the protection of national labor policy to suits by joint labor-management trustees seeking to preserve fringe benefit contributions on behalf of beneficiaries. In the words of the Court,

> "Although this policy exempting the assets of individual members from judgments against their unions was prompted by a solicitude for the union members, because they have little opportunity to prevent the union from committing actionable wrongs, it seems to us to apply with even greater force to protecting the interest of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in

4. 93 LRRM 3081, 3083

5. *Lewis v. Mill Ridge Coal, Inc.*, 188 F.Supp. 4 (E.D.Ky. 1960) *aff'd* 298 F.2d 552 (6th Cir. 1962)

the conduct of union affairs. Thus the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here."

The national labor policy enunciated in Benedict was recently further elaborated in Circuit Judge Adams' concurring opinion in *Huge v. Longs' Hauling Co., Inc.*, supra:

"The wisdom of not permitting employers such as Long to interpose defenses to their undertaking to support union welfare and pension funds seems apparent. With both the number of Americans in retirement and the duration of those non-remunerated years of their lives increasing, and with the costs of health care soaring, it has become ever more important to provide for those situations where the costs of living will no longer be satisfied from anticipated income. Social Security benefits are often insufficient by themselves to meet those needs, and must be supplemented from other sources. For millions of unionized employees, the chosen and preferred method for insuring against the privations of sickness, unemployment, and old age has been the union welfare and pension funds. Under such arrangements, the employer contributes periodically to the funds an amount negotiated by contract. Such contributions are, in reality, indirect or deferred compensation, earned by the employee with each hour of each day worked. Ensuring the viabiity of these funds and protecting the employees' investment from dissipation as a result of union or employer conduct or misconduct has for many years been a concern of the federal government, and has recently received renewed attention.

As Benedict makes clear, insulation of the employer's obligations to union welfare and pension funds from defenses that the employer otherwise may assert to its agreement to perform under the labor contract serves vital public interests. It prevents penalizing employees for alleged union misdeeds over which they have little, if any, control. And it guarantees hard-working people the unemployment, health and retirement protections that they and their families expect to receive as part of the terms of their employment.

Moreover, such a rule forces an employer to disclose promptly any problems that may exist in its undertaking

to provide for its employees' health and retirement needs, rather than create false impressions in the minds of its employees regarding the compensation they are entitled to receive. It thus forecloses the possibility that an employer will surprise its employees by revealing at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future. The employer may still have its claim adjudicated by bringing, in the proper forum, a timely suit against the union for rescission of the contract, anti-trust damages, or a declaration that an unfair labor practice has been committed, as the case may be. It would be discouraged, however, from biding its time in such a way as to jeopardize the future security of its employees.

Finally, it appears preferable as a matter of judicial administration to require that the employer sue the union directly if it believes it has reason to be excused from performing under the labor agreement, instead of permitting it to assert its claim by way of defense against the trustees. The employer dealt with the union and bases its case on those dealings. Clearly, the enforceability of the labor agreements can better be ascertained in the context of a lawsuit to which the principal actors are parties than in one where one party, the trustees, does not have first-hand knowledge of the material facts."[7]

B. *The Court's Ruling Conflicts With National Policy Embodied In the Employee Retirement Income Security Act*

Congress in its findings and declaration of policy for the Employee Retirement Income Security Act of 1974 stated that:

"The Congress finds that the growth in size, scope, and number of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being

7. 101 LRRM 2396, 2402

> and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate charactor of their participants, and the employers, employee organizations, and other entities by which they are established or maintained . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interest of employees and their beneficiaries, and to provide for the general welfare and free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of such plans . . . that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness." 29 U.S.C. §1001(a)

The financial security of employee benefit plans and the security of the employees who have an interest in such plans are ill served by a ruling which allows an employer to bind surreptitiously the trust funds to future obligations while it evades its own duties. "ERISA" sections 202 through 204, 29 U.S.C. Secs. 1052-1054, require that pension trust funds provide vesting and benefit accrual to all bargaining unit employees on an "hour of service" basis. An "hour of service" is defined by regulations:

> "An hour of service is each hour for which an employee is paid, or entitled to payment for the performance of duties for the employer during the applicable computation period."[8]

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8. C.F.R. §2530.200 B-(2)(a)(1) (1979)

According to the Labor Department,

> "[C]redit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions." [9]

As can be seen, a trust fund may be legally bound to provide credited hours of service to *all* of an employer's non-union employees. In the event these employees work sufficient hours to qualify for retirement benefits within work classifications included in a written labor agreement, they must be paid by the fund. It is unconscionable to require trust funds to meet their "ERISA" obligations to all employees without enforcing contribution payments from an employer.

A trust obligated to pay benefits, and prevented from compelling employer contributions, will increase its unfunded liability until it will not be able to meet future commitments. This effect has been noted in *Central States Pension Fund v. Hitchings Trucking*, 102 LRRM 2139 (E.D.Mich. 1979) where the court awarded judgment for unpaid contributions from an employer which made contribution payments beyond the contractual expiration date. Finding that the employer was estopped by its conduct from denying liability the court added:

> "Finally, the Employee Retirement Income Security Act of 1974 (ERISA) suggests an additional reason why the employer should be required to make the payments to the pension fund. ERISA was intended to stabilize the rights and liabilities involved in pensions established by collective bargaining."
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> •••
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> "Stability and protection requires assurance of adequate funding and the prevention of arbitrary termination rights. ERISA protects employees' rights to pension funds under pension trust of the employees qualify. 29 U.S.C. §§1052 and 1054. Whether payments to the trusts have or have

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9. Labor Department Advisory Opinion Letter on Delinquent Contributions dated August 31, 1976, 19876, Opinion 76-89 221 BNA Pension Reporter R-24

not been made by the employer is not relevant in the determination as to whether or not an employee qualifies.

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"A ruling by this court in an action between the employer and the fund could not adversely affect the rights of the employees to make claims against the fund when they become due, regardless of whether this court would have ordered the employer to make payments. It is not unlikely that they might prevail on the same theory that is being asserted in this case by the plaintiff.

A *ruling adverse to the plaintiff in this court would place the plaintiff in an anomalous position: It would have no defense whatsoever to the claims being made by the employees.* As a result of this decision, it would be required to meet the *financial burden of ERISA's guarantees in the form of pension payments without corresponding contributions to the defendant's employees and similarly situated employees.* As the plan covers several hundred thousand participants, with over 1400 contributing employers, the actuarial soundness of the fund would be compromised. (at LRRM 2141) (Citations omitted and emphasis added.)

Pension funds, financed by employer contributions, will be severely jeopardized if their "ERISA" obligations are not supported by contribution payments. The Court's decision that the trust funds have no right to accrued contributions is clearly contrary to the "ERISA" policy of preserving the solvency of employee benefit plans and securing the interests of employees and their beneficiaries in such plans. The decision allows employers to disavow their pension promises after long periods of partial or even full contractual compliance. During this period employee rights may vest and trust obligations accrue. Pension funds obligated to finance these obligations, but prevented from funding them by enforcing employer promises, will perish.

SUMMARY OF ARGUMENT

1. The decision that contributions are only lawful if paid pursuant to a collective bargaining agreement between an employer and a union which is the exclusive bargaining

representative of the employees is contrary to existing legal precedents, subjects fund managers to insurmountable administrative burdens related to the determination of a union's majority status, and controvenes the intent of Congress as expressed in recent amendments to the Employee Retirement Income Security Act of 1974 (ERISA).

2. In actions by a trust fund for unpaid employer contributions, courts should disallow defenses that an employer might assert against the union if the union were seeking to enforce the collective bargaining agreement. Allowing such defenses undermines many court decisions which have held otherwise and contradicts the national pension policy enunciated through enactment of ERISA.

CONCLUSION

The trust funds urge this Court to grant the Petition for Certiorari.

Respectfully Submitted,

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